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ABSTRACT

These classroom materials are part of the Project Benchmark series designed to teach secondary students about our legal concepts and systems. This unit focuses on kinds of evidence and methods of proof. The materials trace the historical development of the concept of evidence in English common law and explains the various kinds of evidence. The second section provides brief definitions of such legal concepts as accusatory pleading, beyond a reasonable doubt, burden of proof, circumstantial evidence cross-examination, direct evidence, expert witness, hearsay. judicial notice, perjury, and preponderance of evidence. Suggestions for a sample lesson using the materials are included. This lesson requires students to play the roles of accusers, defenders, and gatekeepers who must decide on the importance and validity of evidence in a sample case. (DE)

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EVIDENCE BEFORE THE COURT

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Evidence Before the Court

LET'S CLIMB INTO OUR STURDY TIME-MACHINE and go back to the year 973. The place is England. The Romans, who came with Julius Caesar, have long since gone. Only the ruins of their forts and some of their magnificent roads remain. And it will be almost a hundred years before the Normans under William the Conqueror land on England's shore, defeat King Harold, and change the course of the island's history.

Our machine lands us in the courtyard of the lord's manor house. A crowd of people are gathered; there are pennants flying, and the ladies, in their finest silks and satins, add brightness to the scene. We think it must be a festival, until we see that the center of attention is a pair of husky, bearded men clad in rough iron and leather armor. Each carries a heavy shield and a businesslike sword. They stalk around a cleared space, some distance apart, frowning, glowering, darting black looks, one at the other. On a platform nearby, several people are gathered in some sort of ceremony.

A stately-looking man in velvet, holding a scroll, seems to be doing most of the talking. We listen -- but cannot understand a word of 10th century English. So we switch on our audio-computer which translates for our modern ears.

"Aethel, of the vill of Dunstan, claims that he and his ancestors, to a time when the memory of man runneth not to the contrary, have been the owners of the land that lies between the church and the furthest spring. Now Aethel comes before us and declares that he let Robert and his wife Judith live upon the land and till it, and they in turn gave to him, Aethel, one-half of the crops grown there. And, he says, their term there should be as long as Robert were to live. Now Robert has died, having fallen from his horse after a night at the mead-seller's, and therefore the term is ended. He prays us that Judith leave, since she will not go of her own doing.

"Whereupon we asked Judith why she does not leave, according to the covenant with Aethel. And she replies that his story is false, that the land was let to her and Robert so long as *either* of them should live. Therefore she will not leave, having no living kin, and no place to go.

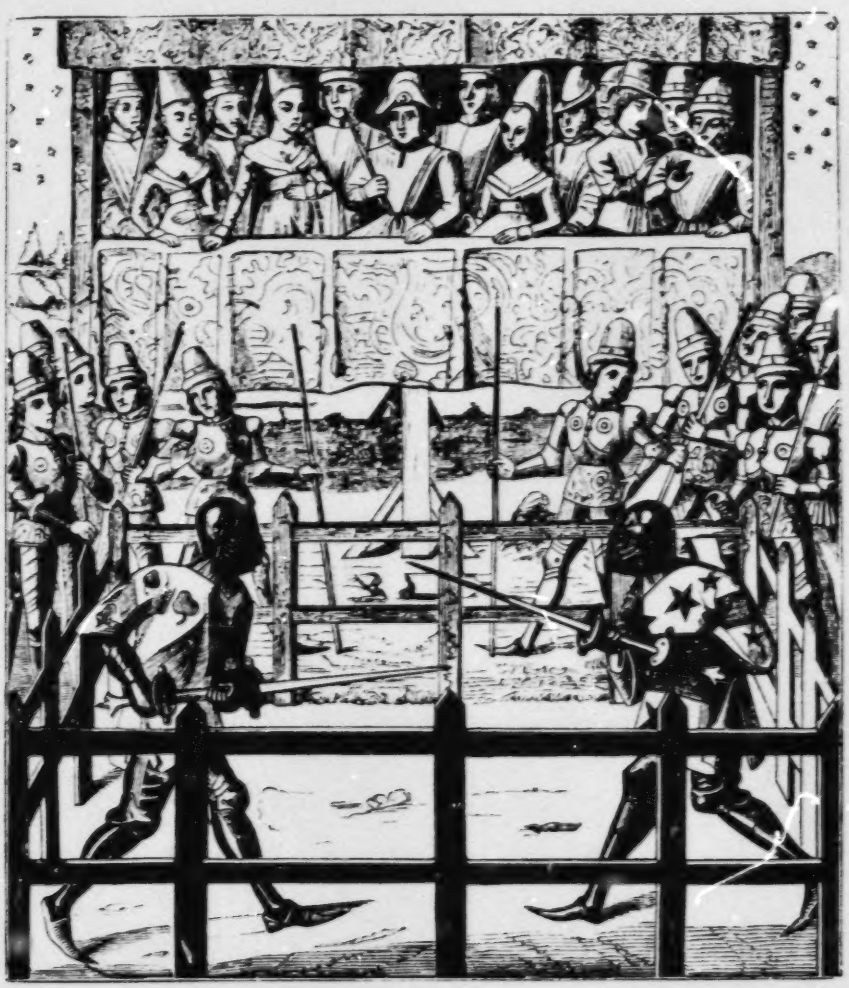
"Now each declaring that the other speaks not true, they ask for trial by battle, that the truth be known and justice done. Being a woman Judith has hired for her champion Alfred. And Aethel has hired Geoffrey, Aethel being elderly and having but one leg, and infirm withal.

"Now let these champions do battle, and by the grace of our almighty Lord, let he who stands for the truth prevail, and he whose cause is false, fail and be vanquished."

There is a flourish of trumpets and one of the ladies on the platform drops a glove to the ground.

The two champions approach each other warily, shields raised, swords poised to strike and parry. Geoffrey, the landowner's man, aims a sweeping blow at his opponent. Alfred catches it on his own sword as the two men lurch, then grapple. Geoffrey stamps his iron-heeled boot into the instep of his opponent's foot. Alfred drops to one knee, catching another sweep of the sword. Then he bounds up and takes two vicious cuts at Geoffrey. One of the cuts strikes tough leather, stinging, but not injuring Geoffrey. Once more they circle warily.

Alfred seems to stumble on his stomped foot, and Geoffrey starts forward, only to receive a handful of dust that Alfred has scooped up and flung at his face. Spitting and cursing, Geoffrey backs off.



THE CONTEST.

TRIAL ENDS

SUDDENLY, AS IF BY SIGNAL, the two champions leap at each other, flailing mightily with both their swords and shields. For long minutes there is the spark and crash of iron on iron, the grunts and curses of the fighters, the cheers and groans of the spectators.

A blow from Geoffrey's sword strikes Alfred's blade at an angle, snapping it off. At the same time Geoffrey lunges forward, strikes the widow's champion with his heavy shield, and sends him sprawling to the ground. The now defenseless man holds up an arm in supplication; slowly Geoffrey lowers the menacing sword point aimed at Alfred's throat.

Again a flourish of trumpets is sounded; the trial is over. The widow has lost. Judgment is scratched on the rolls; the lords, the ladies, the spectators depart.

Arm in arm, the two champions set off for the nearest tavern for a trencher of mutton, some tankards of ale, and a long talk about their next battle engagements.

Today we think trial by battle was an unjust way to decide disputed issues. Nor do we find satisfactory trial by water, where the accused was tied up and tossed in the local pond. If he floated, he was innocent; if he sank, he was judged guilty. Still another test of truth, today considered "cruel and unusual punishment," was trial by fire. The accused grasped a red hot iron or walked barefoot through red hot coals. If he didn't blister, the court believed his story.

THE OATH HELPERS

AFTER SEVERAL GENERATIONS OF DUNKINGS, blisters and blood, the English courts tried another approach to discern the truth. They invented trial by compurgation. Here the accused took an oath that his story was true, that he had borrowed -- not stolen -- John's ox for his spring ploughing. The court let the accused bring in his compurgators or oath helpers. These helpful neighbors also took oaths and swore that what the accused said was true.

What the compurgators said could not be questioned by the authorities, so there was no way of being sure that the compurgators were telling the truth. This was still a pretty crude system. But if you had a claim, it was a lot better for your health than walking barefoot over hot coals.

THE JURY

ABOUT THE TIME OF ROBIN HOOD, the early part of the thirteenth century, the courts began using juries to help with cases. But those juries were far different from the ones we use today. Then, the jurors were people who knew something about the case personally. And their "knowledge" often included gossip, rumor, and hearsay. Such juries might have worked well at the time. Villages were small and people seldom traveled more than a few miles from the place where they were born. Everyone knew everyone else -- and just about everything about him. So if a man stole a sheep, or clipped coins, or baked shortweight bread, his neighbors were usually aware of it.

Later, in the eighteenth century, English courts decided that both criminal and civil verdicts had to be based on sworn testimony of witnesses -- and then tested by CROSS-EXAMINATION. It had taken all that time for the courts to realize that they couldn't rely on what witnesses swore to. They needed a technique to find out when a person *exaggerated*, when he *lied outright*, when he was *honestly mistaken*, when he *thought* he saw or heard something he didn't see or hear at all. And that, of course, was cross-examination -- the questioning of those on the other side to test for the truth.

We must give the English credit, for they were -- and are -- a justice-loving people. They knew that their system of justice wasn't perfect, and they were willing to experiment and seek better ways of firding the truth.

GROWTH OF COMMON LAW

WHILE THE COURTS WERE LOOKING FOR BETTER WAYS of administering justice, English law was growing, too. It grew out of local customs and rules. If you rented me your plough, I was bound to return it in good condition -- as the courts would say, "according to the laws (customs) common throughout England." The law was (and still is) that one who comes into lawful possession of property, but wrongfully refuses to return it, must pay damages. Where did this law come from? The law always existed, the courts would say; in stating it, the court is "declaring the common law."

It was good law for the times because it was the peoples' law; it sprang from their own needs and wishes. It wasn't forced on them by higher authority.

The common law covered a lot of subjects, including evidence. Common law determined what was -- and wasn't -- acceptable proof. What kinds of papers, for example, would the courts look at to prove ownership of a farm? Was it proper to let a man who knew about precious stones tell the court the value of a certain jeweled dagger? If other witnesses could be ordered to tell what they knew about John of the Mill, could his wife, too, be ordered to tell? These were questions answered by the common law.

CROSSING THE OCEAN

IN TIME, AMERICA WAS DISCOVERED. And the English began to settle across the sea, thousands of miles from the motherland. It was natural that they should set up a system of justice following the common law, similar to the system they already knew. Not all lawyers in America were educated in England, but they received their lawbooks from there.

In the years before the American Revolution, one English law professor, Sir William Blackstone, greatly increased the legal knowledge of the colonists through his book entitled "Commentaries on the Laws of England." Lawyers, statesmen, legislators, and even interested citizens read Blackstone to understand public law and the nature of the common law. The "Commentaries" are still being studied by law students and scholars who want to understand more about our legal heritage.

WAR WITH ENGLAND

IN 1775 BRITISH TROOPS FIRED on American colonists. The war was on. Four bloody years later, the colonists won -- and started the slow business of becoming a nation.

Through many years of disasters and triumphs, the colonists had kept

the same courts and the same law. But then they did something unique in the history of the world. They erected a canopy over these laws -- a master set of governmental principles -- and called it the Constitution of the United States of America. The Constitution divided up the powers of the government into the executive, legislative, and judicial branches. It arranged a system of "checks and balances" to prevent any one branch from becoming too powerful. All laws, whether common law or law made later by the legislatures, had to be in harmony with the principles of the Constitution.

These principles protected citizens. The colonists had fought hard for their liberties -- and they intended to preserve them for themselves and their children. That is why, even today, we are so careful about informing ACCUSED people of their rights. Why we insist on search warrants in order to enter homes. Why we sometimes attack long-standing laws, and sometimes overturn them.

Just as our ancestors in ancient England, so we experiment and search for better methods of obtaining justice for everyone. Our current laws and court procedures are better than they once were, but they are still not perfect. It's not likely that we'll ever achieve perfect justice for everyone. But we can do no less than try.

DIFFERENT APPROACH

THE EARLY TRIALS BY ORDEAL DIDN'T WORK WELL because the ancient courts missed an important point. They didn't see that quarrels could be analyzed into law on one hand, and fact on the other. Was the owner of the land, Aethel, or the tenant, Judith, telling the truth about which had the greater right to occupy the disputed property? They tried to settle the question with a truth-test.

Today we would approach the question differently. We would look at the evidence to see to what terms Judith, Robert, and the owner, Aethel, really did agree. We might:

* *Look first at the written lease or agreement, if one exists.*

* *Find witnesses who were present when the agreement was drawn up.*

* *Locate correspondence between Aethel and his tenants indicating who was telling the truth.*

* *Ask how long since Robert's death Judith has remained and paid half her crops as rent. For if it were several years, we might take this as an unspoken understanding that she could remain, regardless of the terms of the original agreement.*

Then, having found whatever evidence exists, the attorneys would present it to the court, and the court would apply the law and order judgment.

KINDS OF EVIDENCE AND METHODS OF PROOF

JUST WHAT *IS* EVIDENCE TECHNICALLY? California law says it "is the means, sanctioned by law, of ascertaining in a judicial proceeding the truth respecting a question of fact."

These means are:

1. *Testimony of witnesses*. People see, hear, feel, taste, and smell -- and they can tell what happened in terms of their senses. "When the fire broke out, I felt the heat and smelled a strong odor of kerosene." (Evidence Code, Section 700)

2. *Writings*. Letters, deeds, bills of sale, agreements, leases, guarantees, books, statements, records, wills, court papers -- all these, and more, may be evidence for certain purposes. (Evidence Code, Sections 1271, 1272, 1281, 1401, 1419, 1420)

3. *Other material objects presented to the senses*. These may include objects which have a direct bearing on the case. For example, a gun found in the accused's trunk, similar to the one used in the crime. Or a jeweled cufflink found at the scene of the crime. Or illegal narcotics seized during a drug raid. (Evidence Code, Section 351)

4. *Knowledge of the court*. That is, the court will take JUDICIAL NOTICE of some things, such as the meanings of English words and phrases, existing laws, measures of time, geographical divisions, and other well-established information. (Evidence Code, Section 451)

5. *Presumptions*. These are deductions which the law says may be made from particular facts. The jury makes the deductions. For example, if someone deliberately commits an unlawful act in order to injure another, there is a presumption that he did so maliciously and with guilty intent. (Evidence Code, Section 600)

Judges are strict about admitting evidence. With a few exceptions, only those kinds of evidence listed above are permissible in court. Rumor is not. Nor is public opinion. Hearsay is admitted only under certain very carefully prescribed circumstances. And judges demand that evidence be "relevant"; that is, that it relate to the case. If you're suing Jim Johnson for rent he owes you, for example, it is relevant to show that he lived in your duplex for three months without paying you. It is *not* relevant for Jim to show that he is kind to his mother. He may be -- but the judge will disregard this fact because it has no relevancy to the case.

The judge thus serves as gatekeeper for the court. He may either

"let in" proper evidence, or keep evidence out. He decides, in short, *what* evidence to allow in court; the jury decides whether to *believe* it, and how much *weight* to give it.

Room for Improvement

THE RULES OF EVIDENCE, as outlined above, are not perfect. They are designed to help courts get at the truth or as near the truth as it is humanly possible to get.

Yet miscarriages of justice do occur. And some witnesses do lie under oath -- commit PERJURY -- and get away with it. Though not as often as you might think. And certainly with the best of intentions, witnesses make honest mistakes about what they saw or heard. "I heard this shot, and a scream, and saw this man run out of the building. He was a short man, I think; about five-feet-six, with a lot of blond hair, wearing jeans and a blue navy jacket . . ." Is this *really* what the witness saw in the second or two the man was visible? Or is he filling in -- quite innocently -- some of the gaps with his imagination? The cross-examining attorney's job is to show the jury how difficult identification under these conditions really is.

With all their faults, however, our court procedures and rules of evidence are more effective in insuring justice than they ever were. And judges and lawyers are continually attempting to improve them.

For example, courts no longer allow either side in a trial to spring surprises on the other. In both criminal and civil cases, courts now rely on the concept of "discovery"; that is, either side may ask questions of the other before the trial, and examine the other side's evidence. A district attorney, for example, is not permitted to hold back evidence which might tend to clear the accused if it were known.

A further improvement in court procedures is the requirement that any investigation producing evidence must be honest. We do have wrongdoers among us, and it's important that they be caught for society's protection. Some people think that their capture is so important, however, that police may use illegal methods in the process. Like wiretapping telephones without court orders. Most of us in a democracy do not believe this; we think our police are capable of finding the evidence they need through purely legal means. Thus we have passed laws that prohibit a court from admitting evidence which has been illegally obtained.

Using Evidence

IT'S TRUE, THE RULES CONCERNING THE USE OF EVIDENCE are quite complicated. Sometimes even the judge will have to think very carefully before he decides whether or not to admit certain testimony or a particular document as

evidence. And certainly the jurors will have to listen very carefully both to the evidence presented to them during the trial *and* to the instructions the judge gives them on how to weigh that evidence to reach a decision. One piece of evidence may be more important than another; it will weigh more heavily with the jury. Some other evidence might be interesting, but it won't have much to do with the central issue of the case or the jury's decision. To better understand these rules of evidence -- how one kind differs from another and how the evidence will be weighed in a trial -- let's read very carefully over the next few paragraphs.

DIRECT EVIDENCE AND CIRCUMSTANTIAL EVIDENCE

SOME CASES REQUIRE DIRECT EVIDENCE. This means that an eyewitness has actually seen or heard the events he describes to the court. Or that someone has brought in an original document which proves the fact in question. For example, your late Uncle Willie's nurse says he left her half his fortune. To prove her case, she must bring in his will, showing that he really did name her as an heir. In this case, the will is direct evidence.

Another kind of evidence considered by the court is CIRCUMSTANTIAL EVIDENCE, sometimes referred to as indirect evidence. People use circumstantial evidence often in their everyday lives. An example: Here's Junior, with strawberry jam all over his face and hands and a happy smile on his face. And there's the jam-pot -- empty. This is circumstantial evidence. We didn't actually see Junior with his fingers in the jam. But from the evidence, we infer that Junior did indeed raid the pantry. And while it is possible that Junior is innocent, unless he has some proof to convince us that he's not the culprit, we're going to send him off to bed without dinner.

HEARSAY EVIDENCE

YOU'VE HEARD SOME KINDS OF EVIDENCE spoken of as HEARSAY. The general rule of law is that the judge will not allow the jury to consider hearsay evidence. Just what is hearsay -- and why is it viewed so suspiciously? Hearsay is an off-the-stand statement made by someone who is not in court to take the stand and be questioned. Hearsay is often brought up in court when a witness attempts to tell the judge and jury about something he heard someone else say, not what he himself saw or heard.

Let's say Mr. Phelps is on trial for murder. A witness on the stand says, "His landlady told me Mr. Phelps had a terrible temper and often threatened to kill his wife."

Mr. Phelps's attorney would certainly say, "Your Honor, I object to

this statement as hearsay, and I move that it be stricken from the record and the jury asked to disregard it."

Now why is this hearsay? It is hearsay because the statement about the temper and the threats was made by someone else. Why don't we allow such statements in court? They might contain very important information. True. But consider this: the landlady isn't in court under oath. And she can't be cross-examined. How can we be sure she is telling the truth? How can we be sure that she isn't exaggerating? Or that she didn't make the statement jokingly? Or perhaps she is senile, or mentally ill, or has a grudge against Mr. Phelps because he was slow paying the rent last month.

People often speak carelessly in idle conversation. "He told me he had to get some money in a hurry," someone might report, when in fact what the person really said was, he had to hurry to the bank to cash a check. The first version might sound like a motive for burglary. The second indicates only a perfectly legitimate errand. Errors like this -- often unintended -- cause courts to reject hearsay.

HEARSAY EXCEPTIONS

WE'VE SAID THE GENERAL RULE is that hearsay evidence won't be accepted by the judge. But there are many exceptions. One of these occurs in a situation in which the person quoted is under some special compulsion to speak truthfully. Say a witness comes on the scene just as the victim, dying of a gunshot wound, speaks: "Carl Smith shot me. He said he was going to kill me, and he has finally done it." Here the victim is dying, and he knows it. There is a strong presumption that he is going to tell the truth. Or at least that he will say what he believes to be true. It's possible that someone else really shot him. Or that the victim seized the chance to "frame" Carl Smith. But it's not very likely. And if the accused man should be framed, he might well be able to prove his innocence through other evidence. Such as the fact that he was in Europe at the moment of the shooting. Or that the victim couldn't recognize people more than two feet away without his glasses. So in Carl Smith's case, the judge would probably admit the hearsay evidence.

Another exception to the hearsay rule is a situation where a person not directly involved in the case being tried is quoted as having said something against his own interest -- something that might subject him to legal penalties. For example, Andy is on trial for the murder of his business partner Leonard Davis. Andy's attorney brings in a witness who tells the court that a fourth party, Mervin Jackson -- now living in South America -- told him over drinks at the local bar just a few days after the murder, that he "killed Davis for messing around with my wife, and I gotta get out of here fast before the cops get after me." Jackson's statement against his own interest made to his drinking buddy will be admitted as evidence under the "declarations against interest" exception to the hearsay rule.

Records made in the usual course of business -- such as checks, deeds,

promissory notes, wills, and public records -- plainly can't be sworn in or cross-examined. So technically they, too, are hearsay. But they are also exceptions to the hearsay rule. A proper foundation must be laid first -- that is, the person offering the documents must show where they came from and, in effect, authenticate them as being what they seem to be. Birth, death, marriage records, and certain others, too, are admissible as evidence.

BEST EVIDENCE

PAPERS AND RECORDS ARE OFTEN VERY IMPORTANT in both criminal and civil cases. There are *original* papers, written or typed by someone. And there are also *copies* of original papers, or even copies of the copies. The original document is considered as BEST EVIDENCE. One reason is that the court can examine the document to see if there have been any changes or alterations made on it. Such changes might not show up on a copy.

Suppose a man claims injury by falling when the bus in which he was riding gave a sudden lurch. He says he broke a thigh bone, which took months to heal, and also his ankle. His trial might not be held until more than a year after the accident. The physician who treated the patient has subsequently seen hundreds of other people. The doctor won't remember the details. But he does have his office and hospital records.

Those records might show that the injured man didn't have a broken thigh bone at all -- possibly it was only bruised. But before the defending lawyer can introduce those records as evidence, he must first prove they are original records. A photocopy won't do. Or any other kind of copy. If the records are not original, the judge will refuse to let the jury see or consider them. California law says "no evidence other than the writing is admissible to prove the contents of the writing." But what if the original is lost, or for some reason can't be obtained?

The attorney proves that a diligent search was made, and the original record couldn't be found. Then, after showing that the copy he has is accurate, he can use it as evidence. To repeat, the courts want the original papers or records as the best evidence, if they are available. If there is good reason they can't be produced, copies will be permitted.

EXPERT WITNESSES

COURTS WILL ALLOW EXPERT WITNESSES to testify about things that ordinary witnesses cannot testify to. They will permit this when the expert has special "technical" knowledge relating to the facts of the case from which the decision will be made. Courts will also permit expert testimony where, even though the jury knows all the facts, the conclusions depend on the knowledge or skill possessed only by the expert.

For example, two versions of the same holographic or handwritten will may be introduced in evidence, and the jury may be asked to examine the two samples of handwriting -- one genuine and the other one forged. The jury won't know for sure which will is real. But the expert witness will be able to testify, having compared both wills with some other document written by the decedent, which will is genuine. An expert witness in a different situation might be an automotive engineer who can tell the court whether or not a car was working properly at the time it was involved in an accident. A doctor is often an expert witness, fixing the time and cause of death or the extent of someone's injuries. These expert witnesses play an important part in the presentation of evidence to the jury.

Facts in Issue

MOST CASES GO TO TRIAL because people disagree about the facts. Normally in court, one side presents evidence tending to prove certain facts. The other side presents evidence to show that other facts exist which alter the situation. The other side tries to prove that the first side's evidence is untrue and misleading. The judge and jury have the rather awesome task of sorting through all this conflicting testimony in an attempt to find the truth. The judge and jury must weigh all the evidence very carefully to decide if there is enough proof to believe that the accused person really did embezzle $200,000 from the bank for which he worked, or if the courtly old gentleman really did murder his curvacious blonde wife. The criteria the judge and jury use to weigh evidence involve concepts such as "burden of proof," "preponderance of evidence," and "beyond a reasonable doubt," which are discussed below.

Burden of Proof

IF YOU FILE A CIVIL SUIT AGAINST SOMEONE -- say, for money he owes you or damages he did to your car when he rear-ended it -- you must prove your case by a PREPONDERANCE OF EVIDENCE. That is, your evidence must be a little stronger than the other fellow's. Enough, in any case, to tip the scales of justice in your direction.

Let's say you have Ben Smith's note for $1,000 for money you loaned him. Ben has only paid you $200, and he refuses to pay you another cent. You offer the note in evidence. You also offer your records to show the $200 credit.

Ben's evidence is pretty skimpy. He says he doesn't know anything about the note. He tells the judge, "It's a forgery; he just wants to make an easy $800."

Maybe Ben's testimony is perfectly truthful. Maybe he really didn't sign the note. But you have the promissory note, and if your evidence that he really did sign it is a little more convincing than Ben's to the contrary, then you would have proved your case by a preponderance of the evidence.

In a civil case, you -- as the plaintiff -- have to meet the burden of proof. In the above case you met it by introducing the written note and more convincing evidence that Ben signed the note. But what if the circumstances had been somewhat different? Suppose you sold Ben your used motorcycle for the $1,000. He made the first $200 payment and then wouldn't pay the other $800. You go to court, your promissory note in hand. But on the stand Ben tells the judge, "Heck, no, I wouldn't pay him any more money. That motorcycle he sold me was a pile of junk. He represented that it was in good condition, but it fell apart three days after I made the first payment." In this case, Ben has the burden of proving what he said about the motorcycle. After listening to both you and Ben, the jury then decides which witness is the more credible and whose evidence is more convincing; it makes a decision on a preponderance of the evidence.

Reasonable Doubt

HOW ABOUT A CRIMINAL CASE? The defendant in a criminal case is presumed to be innocent until he is proved guilty. Since the "State," usually through the District Attorney's office, prosecutes criminal cases, it is up to the State to prove the defendant guilty BEYOND A REASONABLE DOUBT.

For example, Larry and his wife Maude are accused of firebombing a local bank. During their trial, the District Attorney presents certain evidence in an attempt to prove their guilt. He puts a witness on the stand who claims he saw the young couple enter and leave the building just a few minutes before the explosion. The D.A. also enters as an exhibit the makings for a bomb found in Larry and Maude's car.

The attorney for the defense attempts to dispute and minimize the District Attorney's evidence. During cross-examination, he makes the point that the eyewitness thinks "all those darn hippies look alike -- long, scraggly hair and dirty clothes." The defense attorney also establishes that the chemicals found in the couple's car could be used to blast holes for the fence posts they plan to put up around their property.

Finally the case goes to the jury. After reviewing the evidence, these twelve men and women must *either* decide that the couple is guilty beyond a reasonable doubt *or* acquit them and set them free. In some cases, their decision will be a "close" one because the evidence on both sides may be quite convincing.

. Just what is this "reasonable doubt"? "'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt.'" It is that state of the case, after the jurors have compared and considered all the evidence, at which they cannot say they feel "'an abiding conviction, to a moral certainty, of the truth of the charge.'" (Penal Code, Section 1096) Our judicial system requires jurors to be this morally certain in order to prevent conviction and imprisonment of innocent people.

EVERYDAY EVIDENCE

WILL YOU EVER USE CONCEPTS LIKE "hearsay evidence" or "beyond a reasonable doubt" in your own life?

As a matter of fact, you use evidence every day -- probably without realizing it. And you use the same general principles the judge uses to evaluate this evidence.

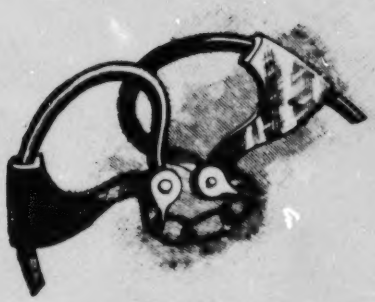
You're looking at a new tennis racket, and the salesman tells you that Easy Eakins, of the Electric Houseflys, has this same identical make and model. That may be entirely true, but it doesn't impress you one bit. You're buying your racket on the basis of weight, feel, and price. Whether Easy Eakins has the same racket or not won't help you with your decision. The fact just isn't relevant evidence.

"Looks like we'll have a substitute teacher for a week 'cause Miss Murphy is coming down with the chicken pox. She looks kind of white and she dropped her ruler twice this morning." You may well doubt the accuracy of the very young person who tells you this. Mainly because you don't think he's qualified to diagnose Miss Murphy's disease. You've just applied the rule for determining the credibility of a witness. The witness -- because of age, inexperience, mental illness, and so on -- can't be relied on.

You weigh evidence, too. The salesman tells you, "This used car is in fine running condition." An expert mechanic friend tells you, "There's a knock in the motor that might mean expensive trouble." Whose advice do you take? The

salesman's, who is interested in making a sale and possibly a commission? Or your friend's, who knows cars and has no financial interest in whether you buy the used vehicle or not?

In short, you use evidence in many of your daily transactions. Perhaps you simply call it "using common sense." And that is very much what the courts do, in a formalized way. Rules of evidence, then, are tools all of us use in trying to settle disputes, in making restitution for injuries, and in seeing that everyone receives as near perfect justice as we can manage in an admittedly imperfect world.



Words and Phrases

Some of the words and phrases relating to this study unit on EVIDENCE are defined and discussed below. The brief explanations accompanying each defined word or phrase -- some complex legal terms -- attempt to relate the material to experiences a student may encounter in his or her own life. These explanations may be helpful to you in discussing the vocabulary with your class.

ACCUSATORY PLEADING--a formal charge against someone, claiming he is guilty of a crime. Three kinds of accusatory pleadings are used in California: (1) Complaint--an accusation made against a person by the arresting officer or complaining witness when the person is first brought before a magistrate for arraignment. (2) Information--the formal accusation filed in the trial or Superior Court when the accused is bound over from the Municipal or Justice Court for arraignment and trial on a felony charge. (3) Indictment--a formal accusation prepared by the Grand Jury and filed directly with the Superior Court, charging the accused with a felony. *(Jason tells the teacher that Marcus stole his lunch. David complains to the professor that Brian cheated on the final. Both boys have made formal accusations against their classmates.)*

BEYOND A REASONABLE DOUBT--before the jury can convict the accused of a crime, it must be satisfied or convinced to a "moral certainty" that the charges against him are true. That is, the proof offered in the case must eliminate all doubt based on reason in the mind of the jury. *(The sun comes up every morning, but few things in life are this certain. For instance, Jane and Andy wait for the school bus each day, and it always comes by 8:30. So Jane and Andy believe beyond a reasonable doubt that the school bus will come every morning by 8:30. There is a remote chance that the bus might break down and not come, but the children are convinced to a "moral certainty" that the bus will always come.)*

BURDEN OF PROOF--the necessity or legal duty to prove a fact in dispute. One of the parties to the case, either the plaintiff or the defendant, has the duty to introduce evidence to prove his case against the opposing party. *(If Marcus denies he stole Jason's lunch, it is up to Jason to find evidence to prove his accusation. For example, he might find a fellow student who saw Marcus actually take the lunch box from Jason's desk.)*

CIRCUMSTANTIAL EVIDENCE--all evidence of an indirect nature and all inferences drawn from direct evidence. This type of evidence is used when the court infers or accepts a fact based on a set of known or proved circumstances. *(Brian received the highest grade in the class on the final exam,*

after he failed the midterm and told several other students he'd been backpacking the whole week before the exam. These circumstances could lead the professor to accept the fact that Brian did cheat on the exam.)

CROSS-EXAMINATION--the attorney for one side questions the witness for the other side. During the cross-examination the attorney will try to lessen the effect of any testimony that might harm his client's case, possibly by bringing out additional facts that shed new light on the person's testimony. *(The gym teacher discovers Larry with a pair of track shoes just like the pair missing from the supply room. When the principal questions Larry further about the shoes, the gym teacher learns that Larry's father bought them for him when the school held its surplus equipment sale a year before.)*

DIRECT EVIDENCE--testimony of a witness to the facts when there is no inference or presumption as to what really happened. Probably the best kind of direct evidence would be given by an eyewitness who actually saw what he is testifying to. *(For example, Linda tells the history teacher that she saw Brian cribbing from several small pieces of paper pinned to his shirt cuff during the exam.)*

EXPERT WITNESS--a person who has more than average scientific, technical or professional expertise, which qualifies him to testify before the court. If a person is certified as an expert witness, the judge may accept his opinion in certain matters when the opinion of the layman would not be allowed as evidence. *(Arnie runs a stop light and smacks into the rear end of Mr. Davis' brand new Buick. In court Arnie claims that his brakes failed when he tried to stop. An automotive engineer, after examining the wrecked car, gives his expert opinion that the brakes were not functioning properly at the time of the accident.)*

HEARSAY--evidence given by a witness repeating what he heard someone else say as opposed to what he himself heard or saw or smelled or felt. *(Leonard tells the officer that he overheard Jeb and Aaron discussing a hit-and-run accident they were involved in, but Leonard himself didn't see the boys hit Mr. Fenster. Upon investigation, the officer learns that Jeb and Aaron were indeed involved in a hit-and-run accident -- with a fence.)*

JUDICIAL NOTICE--the trial judge, without presentation of evidence, acknowledges the truth of certain facts bearing on the case he is considering. These facts are so well known to be true that no evidence or proof is necessary. *(The judge acknowledges the fact that in Mermofield, Calivada, the city where five teens are being tried for persistent curfew violations and loitering, the curfew for juveniles is 10:30 p.m.)*

PERJURY--when a witness in court, under oath to tell the truth, testifies

that some fact material to the case being tried is true -- knowing that what he swears to is not true. *(Fingers crossed in her lap, Millicent smiles up at the judge and says, "Why, Your Honor, I wasn't even in Penny's on the day the man says I stole that dress.")*

PREPONDERANCE OF EVIDENCE--greater weight of evidence, or the evidence which is more believable and convincing than the other side's; not necessarily the greater number of witnesses. *(Joel says Kara fell. Kara says Joel pushed her. Mother sees Joel's muddy handprint on the back of Kara's dress and concludes that Joel did indeed push his sister down in the dirt.)*

Sample Lesson

INTRODUCTION

Each teacher who reads this Education Unit on EVIDENCE will probably consider the same questions:

--How useful is this material to me and my students?

--How can I incorporate part or all of this material into a current or future study unit?

--How can I present this material to my students in an informative and interesting way?

Individual answers will obviously vary according to the age, grade, and ability level of your students, and according to the course you teach and the curriculum with which you must work.

The Sample Lesson included with this Education Unit is but one example of how you might choose to present the material on Evidence to your own class. It's only a suggestion; feel free to modify this lesson or substitute one of your own design. And if you do teach a lesson on Evidence that succeeds with your class, please take the time to write down what you did that worked -- a few sentences are fine -- and send your information to Project Benchmark, 2150 Shattuck Avenue, Berkeley, California 94704.

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THE LESSON

A. CONCEPT: Rules of Evidence

B. GRADE LEVEL: Secondary (9-12)

C. TIME NEEDED: One-Two Class Periods

D. OBJECTIVES: At the end of this lesson students should be able to determine if a particular point of evidence is "relevant" or tends to prove a disputed fact.

E. PROCEDURES: Students will test their knowledge of the rules of evidence by playing the Gatekeeper Game. This game should be played after the students read and discuss the information about evidence included in this unit.

1. The teacher divides the class into three teams:
--Accusers, who will try to prove the Accused is guilty.

--Defenders, who will try to prove the Accused is innocent.
--Gatekeepers, who will weigh the evidence introduced by the Accusers and Defenders and will decide if the Accused is guilty or innocent.

2. The teacher gives each team a copy of the Facts of the Case and a list of the Evidence to be introduced by the Accusers and Defenders for the Gatekeepers' judgment.

3. The Accusers and Defenders discuss among themselves the evidence they have to work with -- how relevant they think it is to proving their case; then they decide how to present the evidence and who should present each point. The Gatekeepers, at the same time, review the rules of evidence they will use to decide whether or not the evidence is admissible.

4. The Accusers present their Evidence one point at a time, telling the Gatekeepers why they feel their evidence is relevant and should be admitted. The Gatekeepers may question the Accusers about their evidence before they accept or reject each point. They will tell the Accusers why they are doing so.

5. The Defenders, in turn, present their evidence to the Gatekeepers, following the same procedures as the Accusers in Step 4.

6. When all the evidence has been presented, the Gatekeepers, in one corner of the room, deliberate among themselves and weigh the evidence to decide if the Accused is guilty or innocent.

7. While the Gatekeepers deliberate, the Accusers and Defenders write down their own decision (each student individually), stating which point of evidence was most convincing to them.

8. The Gatekeepers announce their decision and the class discusses the decision with guidance and questioning from the teacher.

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SAMPLE CASE

Jason Davis, a postal worker, is accused of murdering his landlord Benjamin Creston. The two men have known each other for three years, and their periodic loud arguments about their differing lifestyles are well-known to their neighbors. Davis, a long-haired graduate student, works as a letter-carrier to pay his way through school. Creston, a balding man of 55, is a retired Army enlisted man, who collects the rent and makes repairs at the Royal Arms Apartment.

The Accusers have the following evidence to work with to persuade the Gatekeepers that Jason Davis is guilty:

1. Mrs. Hilda Kress, age 72, will testify that she saw Jason in the hallway near Mr. Creston's apartment shortly before the shot was fired that killed the landlord.

2. Mr. Creston was killed by a bullet from an antique revolver that is no longer being manufactured. Jason owns such a revolver, but it cannot be located.

3. A button from a postman's jacket was found near the body; Jasons' work jacket is missing one button.

4. Quentin Andrews will testify that he overheard two fellow students talking over a beer in a local bar, and that one remarked to the other, "Jason told me he'd kill Creston if he didn't lay off about his hair."

5. Xerox copies of Creston's rent receipt book show that Davis is three months behind in his rent. The original receipt book cannot be found.

The Defenders have the following evidence to work with to persuade the Gatekeepers that Jason Davis is innocent:

1. Tom Dotson, Jason's roommate, will testify that Jason had to walk in front of Creston's door to enter or leave the building, and did so several times each day.

2. Another friend of Jason's, one Harry Barton, will testify that Davis was with him at a rock concert in a town thirty miles away at the time the murder took place. Barton and Davis are boyhood friends, and Jason once saved Harry's life after the two were swept overboard from a fishing boat.

3. Davis himself will admit that he did own a revolver but that it was stolen when his apartment was robbed several weeks before the murder.

4. Anne Helstrom, Davis' girlfriend, will testify that "Jason just couldn't do a thing like that."

5. A handwritten note, found in Creston's apartment, will be introduced. It reads: "Pay up, Creston, or face the music." The signature is thought to be that of a local bookmaker.

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NOTES TO THE TEACHER

1. The evidence in this hypothetical case is *not* conclusive one way or the other. One group of students may convict the accused, while another group will set him free. There is no right or wrong solution to the crime.

2. Emphasis in class discussion should be put on the methodical consideration and analysis of each point of evidence. Is it eyewitness testimony? An original or copied document? Direct or circumstantial evidence? Hearsay? Is the evidence "relevant" to the disputed facts?

3. Many other fact situations can be used within the simplified trial framework set up by the Gatekeeper Game. For instance, you might develop a case using a student situation within a school setting (narcotics are found in a student's desk but he claims he's never seen them before) or a national situation (students might consider the evidence heard by the Watergate Committee in regard to one witnesses' testimony). Perhaps a group of students would even want to write their own case to present to the rest of the class. They might do it on their own or consult with a local lawyer or law student.